

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

To be argued by:
Terrence M. Kelly

Docket No. **77-6200**

In The
United States Court of Appeals
For the Second Circuit

JUSTIN F. LATONA, d/b/a J.F. LATONA CONSTRUCTION CO.,
INC., *Plaintiff,*

-- v. --

G-LAM CORP., THE COMMITTEE FOR ECONOMIC IMPROVE-
MENT OF ESSEX COUNTY, INC., (CEI), THE PEOPLE OF
THE STATE OF NEW YORK AND U.S. COMMUNITY SER-
VICES ADMINISTRATION (CSA) formerly known as U.S. OFFICE
OF ECONOMIC OPPORTUNITY, *Defendants.*

U.S. COMMUNITY SERVICES ADMINISTRATION,
Defendant-Appellee,

-- v. --

G-LAM CORPORATION, *Defendant-Third Party Plaintiff-Appellant.*

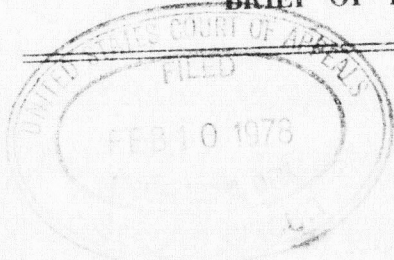
G-LAM CORPORATION, *Plaintiff,*

-- v. --

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,
TOWN OF NORTH ELBA, NEW YORK AND ROBERT
BRODSKY, *Defendants.*

On appeal from the United States District Court
for the Northern District of New York

BRIEF OF THE APPELLEE



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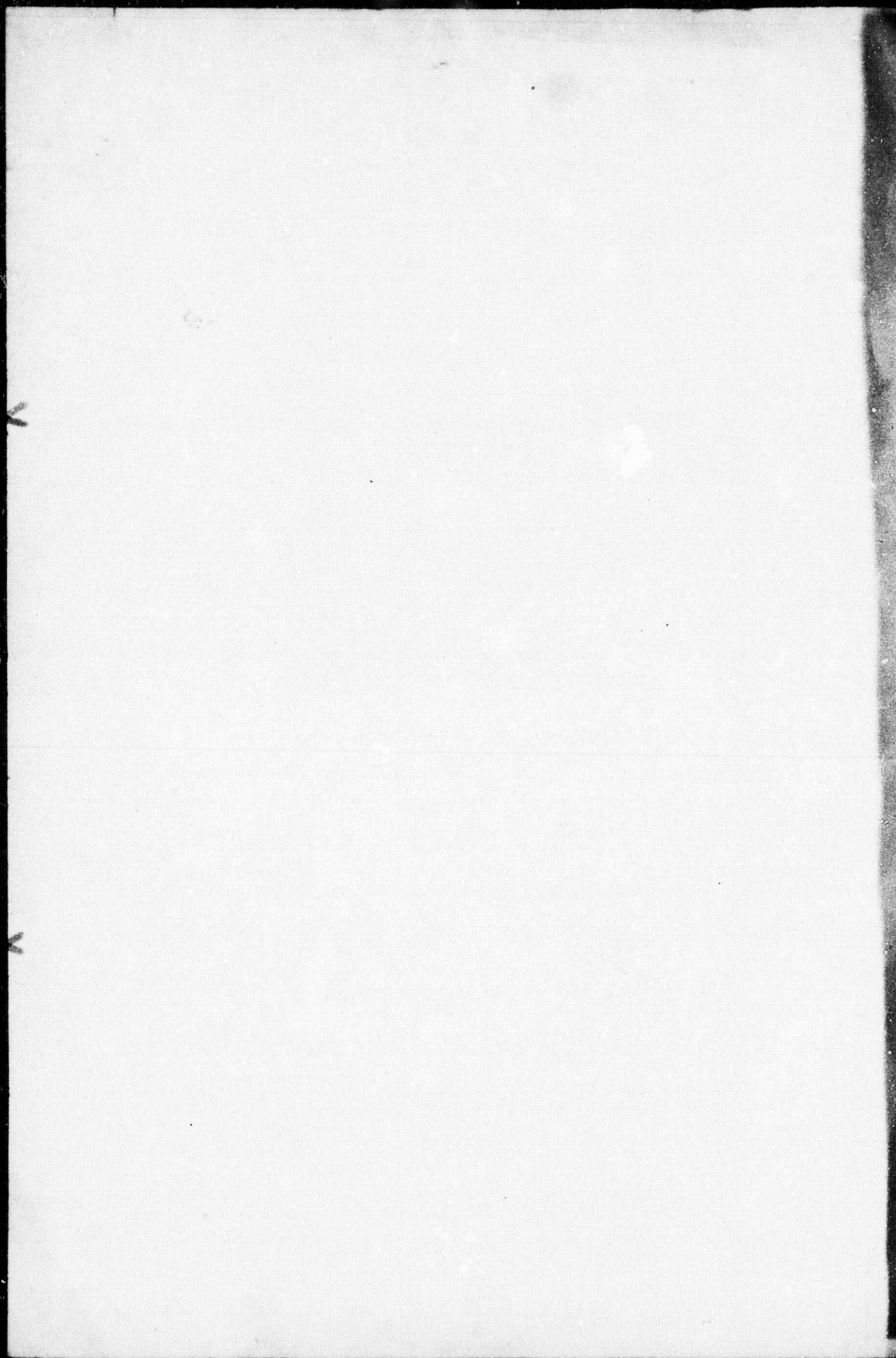


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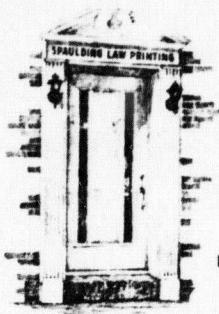
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Re: Justin F. Latona vs. G-Lam Corp., et al

~~XXXXXX~~ Docket No.: 77-6200

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Enclosed please find copies of the above entitled for filing as follows:

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Donald C. Quinn
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Donald C. Quinn

cc: Paul V. French
United States Attorney

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In The
United States Court of Appeals

For the Second Circuit

JUSTIN F. LATONA, d/b/a J.F. LATONA CONSTRUCTION CO., INC.,
Plaintiff,

— v. —

G-LAM CORP., THE COMMITTEE FOR ECONOMIC IMPROVEMENT OF ESSEX COUNTY, INC., (CEI), THE PEOPLE OF THE STATE OF NEW YORK AND U.S. COMMUNITY SERVICES ADMINISTRATION (CSA) formerly known as U.S. OFFICE OF ECONOMIC OPPORTUNITY,
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Defendants.

On appeal from the United States District Court
for the Northern District of New York

BRIEF OF THE APPELLEE

STATEMENT OF ISSUES

I. DOES THE DISTRICT COURT HAVE SUBJECT MATTER JURISDICTION OVER ANY OF THE CAUSES OF ACTION OF G-LAM AGAINST THE COMMUNITY SERVICES ADMINISTRATION.

II. HAS THE APPELLANT STATED ANY ALTERNATIVE CAUSE OF ACTION UNDER THE ADMINISTRATIVE PROCEDURE ACT.

III. IF PLED DOES THE DISTRICT COURT HAVE SUBJECT MATTER JURISDICTION OF A CAUSE OF ACTION BASED ON THE ADMINISTRATIVE PROCEDURE ACT, TITLE 5, UNITED STATES CODE, SECTION 701, ET SEQ. WHEN THE BASIS OF THE CAUSE OF ACTION IS A CONTRACTUAL DISPUTE.

STATEMENT OF CASE

This contract action was commenced in Supreme Court State of New York for Essex County by Justin F. Latona (Appendix pp. 3a-6a) a subcontractor of G-Lam (Appendix p. 4a). It was removed by the United States acting through its Community Services Administration to the United States District Court for the Northern District of New York on October 22, 1976. (Appendix pp. 9a, 10a). G-Lam in its Answer to the complaint of Latona made three cross-claims against the United States acting through its Community Services Administration (Appendix pp. 16-26), hereinafter C.S.A. The claims of the plaintiff, Latona, having been satisfied between him and the Committee for Economic Improvement of Essex County, hereinafter C.E.I., the only claims remaining against the C.S.A. were those contained in the three cross-claims of G-Lam. These cross-claims against C.S.A. were dismissed by the Memorandum-Decision and Order of Hon. James T. Foley on September 9, 1977 (Appendix pp. 77a-92a), and summary judgment was granted for C.S.A.

G-Lam's cross-claims against C.S.A. are all based upon a construction contract between G-Lam and C.E.I. to perform various services and to supply materials for a project intended to renovate and improve certain facilities at Mount Van Hoevenberg in North Elba, New York. (Appendix p. 19a). No allegation is made in the Answer and Cross-Claims of G-Lam that any contract exists between G-Lam and C.S.A. C.S.A. is a federal grantor of funds to C.E.I. pursuant to Title 42, United States Code, Section 2828.

ARGUMENT

POINT I

THE DISTRICT COURT LACKS JURISDICTION OVER ALL CLAIMS FOR RELIEF PLED BY G-LAM.

As G-Lam concedes (Appellant's Brief at p. 8), the District Court lacked jurisdiction over its claims for relief in its complaint because its claims involve a contractual dispute, and the amount in controversy exceeds \$10,000.

The Tucker Act, Title 28, United States Code, Section 1346 (a)(2) limits a district court's jurisdiction in suits on contracts against the United States to \$10,000. It has been held that there is no jurisdiction in the district courts when the amount in controversy exceeds \$10,000. *Putnam Mills v. United States*, 432 F.2d 553 (2d Cir., 1970); and *Massachusetts v. Connor*, 248 F.Supp. 656 (D.C. Mass., 1966) aff'd 366 F.2d 778 (1st Cir., 1966).

G-Lam in Count II of its cross-claim against C.S.A. seeks a declaratory judgment against C.S.A. and in Count III of its cross-claims seeks an injunction against C.S.A. Both Count II and Count III are based upon the alleged breach of contract between C.E.I. and G-Lam. The Tucker Act, *supra*, does not authorize the district court to grant any relief except money judgments. It has been held that a district court when sitting as a Court of Claims cannot grant equitable relief. *United States v. Sherwood*, 312 U.S. 584, 588, 61 S.Ct. 767, 770

(1941); *Lee v. Thornton*, 420 U.S. 139, 95 S.Ct. 853, 854 (1975). Thus even if G-Lam's claims against C.S.A. were for \$10,000 or less the district court would not have jurisdiction over G-Lam's claims for declaratory and injunctive relief.

Therefore, even if a contract did exist between C.S.A. and G-Lam there is no jurisdiction in the district court to hear any of G-Lam's claims for relief against C.S.A. But more fundamentally, no contract is alleged to exist between C.S.A. and G-Lam in G-Lam's cross-claims (Appendix pp. 19a-26a). G-Lam says that C.S.A. has not proven that a contract does not exist between G-Lam and C.S.A. (Appellant's Brief, p. 9). This is certainly not necessary when no such contract is alleged to exist in G-Lam's cross-claims. The only contract which G-Lam alleges to exist is between G-Lam and C.E.I. (Appendix p. 20a).

In *United States v. Orleans*, 425 U.S. 807, 816, 96 S.Ct. 1971, 1977 (1976), the Supreme Court held in a case involving the Federal Tort Claims Act, Title 28, United States Code, Section 2671, et seq., that a local community action agency, which C.E.I. is pursuant to Title 42, United States Code, Section 2790(a), is not a federal agency even though it is a grantee of federal funds. The Court stated in *Orleans* at p. 816, 1977:

Federal funding reaches myriad areas of activity of local and state governments and activities in the private sector as well. It is inconceivable that Congress intended to have waiver of sovereign immunity follow congressional largesse and cover countless unidentifiable classes of "beneficiaries".

The Court of Claims has always followed this reasoning and has held that the United States, in this case its agency C.S.A., is not a party to contracts between local grantees and other parties. *D.R. Smalley and Sons, Inc. v. United States*, 372 F.2d 505, 507, 508, 178 Ct.Cl. 593, cert. denied, 389 U.S. 835, 88 S.Ct. 45 (1967); *Housing Corporation of America vs. United States*, 468 F.2d 922, 924 (Ct. Claims, 1972). The Court of Claims stated in *Housing Corporation of America* at p. 924:

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The contract here in issue is one of many pursuant to which the Federal Government subsidizes projects of state and local authorities for public betterment. The United States, however, does not make itself a party to the contracts relating to said projects but obligates itself by separate agreements, as here, to local authorities for the funding of those projects it approves. The significance of that approval is spelled out here in Article IX. This does not create an express or implied contract between the plaintiff and defendant nor does it make the Commission defendant's agent through HUD. HUD's actions were performed in defendant's capacity as sovereign. This principle has been settled for some time by a similar case involving construction under the Federal Aid Highways Act, *D.R. Smalley and Sons v. United States*, 372 F.2d 505, 178 Ct.Cl. 593, cert denied, 389 U.S. 835, 88 S.Ct. 45, 19 L.Ed. 2d 97 (1967) The *Smalley* case is squarely in point.

G-Lam's attempt to distinguish *Housing Corporation of America, supra*, from the instant case (Appellant's Brief p. 12) because of the Court's discussion of an article in the contract of sale between the plaintiff and the local grantee does not aid G-Lam in its argument in this case. The Court of Claims in *Housing Corporation of America, supra*, said that there is no contract between the United States and a seller to a local grantee and in addition that the specific contractual clause discussed did not give any additional rights to the plaintiff. In the instant case no specific contractual clause is alleged to exist by G-Lam to give it any third party beneficiary rights to sue C.S.A. on a contract between C.E.I. and G-Lam.

G-Lam's attempt to analogize *Hebah v. United States*, 428 F.2d 1334 (Ct. Claims, 1970), is without merit. In *Hebah, supra*, the Court of Claims relied upon language in the treaty between the United States and the Shoshonees and Bannack Tribes that the injured person be reimbursed for loss sustained. This type of contractual provision clearly has no application to the case at bar. Also the Court of Claims in *Housing Corporation of America, supra*, at p. 926 rejects *Hebah* reasoning unless possibly there is a breach of contract between the federal grantor and the local agency. No such breach is alleged by G-Lam.

The other cases cited by G-Lam where the United States has been held suable on a contract by a third party, such as *Maneely v. United States*, 68 Ct.Cl. 623 (1929) and *United States v. Huff*, 165 F.2d 720, (5th Cir., 1948) are inapplicable to the case at bar because they arose out of fact situations where the government had contracts with a party who in turn subcontracted with another party. They do not deal with a federal agency who granted funds to a local community action agency.

The sovereign is immune from suit and absent a waiver of this immunity the courts are without jurisdiction to hear a suit against the Government. *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 769 (1941); *Gardner v. United States*, 446 F.2d 1195, 1197 (2d Cir., 1971). The waiver of sovereign immunity in actions based on contract is Title 28, United States Code, Section 1346(a)(2). This waiver places jurisdiction in the district courts for suits under \$10,000 and does not provide for equitable relief and requires a contract with the United States. Since G-Lam's claims all are beyond this waiver, the claims of G-Lam had to be dismissed by the District Court for lack of subject matter jurisdiction, and summary judgment granted for C.S.A.

POINT II

G-LAM'S CROSS-CLAIMS AND MEMORANDA OF LAW DO NOT STATE A CAUSE OF ACTION UNDER THE ADMINISTRATIVE PROCEDURE ACT, TITLE 5, UNITED STATES CODE, SECTION 701, ET SEQ. AND EVEN IF PLED THE ADMINISTRATIVE PROCEDURE ACT DOES NOT SERVE AS A BASIS OF JURISDICTION IN A CONTRACT ACTION.

The Administrative Procedure Act, Title 5, United States Code, Section 701, et seq. provides in relevant part of Section 702, that:

a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof . . .

And in Title 5, United States Code, Section 551, agency action is defined:

"Agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

G-Lam's cross-claims against C.S.A. (Appendix pp. 19a-24a), no matter how liberally read, do not state a cause of action under the Administrative Procedure Act, for no "agency action" is challenged.

G-Lam now contends that its Reply Memorandum of Law (Appendix pp. 63a-76a) should have been construed as a motion to amend. In *Chambliss v. Coca Cola Bottling Corporation*, 274 F.Supp. 401, 409 (E.D.Tenn., 1967) aff'd. 414 F.2d 256 (6th Cir., 1969) cert. denied 397 U.S. 916, 90 S.Ct. 921 (1970), the District Court said:

Even under liberal federal rules of pleading, the practice of amending by brief seems inappropriate.

In *S.E.C. v. National Student Marketing Corp.*, 73 F.R.D. 444, 447 (D.C.D.C., 1977), the District Court permitted amending of a complaint by a brief when the brief formally moved the court for permission to amend. The Court in *National Student Marketing* in footnote 10 at page 447 distinguished *Chambliss*, *supra*, in that the brief in *Chambliss* merely expressed a desire to amend and did not formally move to amend. G-Lam in its reply brief did not express a desire to amend nor did it formally move to amend under Rule 15 of the Federal Rules of Civil Procedure.

G-Lam correctly points out that the district court in *Tron v. Condello*, 427 F.Supp. 1175, 1182 (S.D.N.Y., 1976) treated discussion of a statute in a supplemental memorandum as a motion to amend. However, factually *Tron v. Condello* is distinguishable from the present case. In that case the plaintiff

attacked a section of New York Law as being unconstitutional and during the course of the litigation the New York Court of Appeals found the statute under attack to be violative of the State Constitution. The New York State Legislature then enacted new legislation dealing with the same subject. By brief the plaintiff attacked the constitutionality of the new legislation and viewed it incorrectly as an amendment to the struck down legislation. This is entirely different from the present situation where G-Lam discusses an entirely different statute and alleges other facts than those contained in its cross-claims.

Even if G-Lam had properly pled a cause of action against C.S.A. under the Administrative Procedure Act, *supra*, the district court would not have jurisdiction over it.

When a claim against the United States is based on a contract, the Administrative Procedure Act is inapplicable. *Warner v. Cox*, 487 F.2d 1301 (5th Cir., 1974); *International Engineering Company v. Richardson*, 512 F.2d 573 (D.C. Cir., 1975); but see *National Helium Corporation v. Morton*, 455 F.2d 650 (10th Cir., 1971) when N.E.P.A., 42 United States Code, Section 4321 et seq. is involved. It is clear from G-Lam's cross-claims that the present case is a contractual action (Appendix pp. 19a-24a).

The Fifth Circuit in *Warner v. Cox*, *supra*, p. 1306 stated clearly why APA cannot serve as a basis for jurisdiction in a basically contractual dispute:

Since the United States by reason of its nature acts only through agents, it is hard to conceive of a claim falling no matter how squarely within the Tucker Act which could not be urged to involve as well agency error subject to review under the APA. Little imagination is needed to foresee the consequences of a holding that such claims as this may be reviewed either in a court having power to grant equitable relief against the United States or in one having none. We refuse to believe that Congress intended, in enacting the APA, so to destroy the Court of Claims by implication.

In an analagous case this Circuit in *J.C. Penney Company v. United States Treasury Department*, 439 F.2d 63 (2d Cir., 1971) refused to hear claims of denial of due process by a plaintiff when jurisdiction for the substantive issue rested in the Customs Court. The Court in *J.C. Penney*, at p. 38 felt that it would undermine the Congressional plans for customs law adjudication if it accepted jurisdiction over the plaintiff's case under any of the claimed sources of jurisdiction. Likewise G-Lam is seeking to avoid the Congressional scheme for adjudication of contract claims against the United States, by attempting to use the Administrative Procedure Act as a basis of jurisdiction in a case sounding in contract.

G-Lam also lacks standing to sue C.S.A. under the Administrative Procedure Act. In order to have standing, G-Lam must point to some relevant statute which seeks to protect it. *Sierra Club v. Morton*, 405 U.S. 727, 731-733, 92 S.Ct. 1361, 1364, 1365 (1972); *Rasmussen v. United States*, 421 F.2d 776, 778 (8th Cir., 1970). Presumably, G-Lam is relying on some part of Title 42, United States Code, Chapter 34, Subchapter II, Urban and Rural Community Action Programs and specifically Title 42, United States Code, Section 2828 under which C.E.I. is funded by C.S.A. However, the Congressional purpose is stated in 42 United States Code, Section 2781(b) does not include any intent to benefit construction contractors such as G-Lam. Section 2781(b) reads:

(b) It is further declared to be the purpose of this subchapter and the policy of Community Services Administration to provide for basic education, health care, vocational training, and employment opportunities in rural America to enable the poor living in rural areas to remain in such areas and become self-sufficient therein. It shall not be the purpose of this subchapter or the policy of Community Services Administration to encourage the rural poor to migrate to urban areas, inasmuch as it is the finding of Congress that continuation of such migration is frequently not in the best interests of the poor and tends to further congest the already overcrowded slums and ghettos of our Nation's cities.

It should also be noted that the Supreme Court in *Califano v. Sanders*, 430 U.S. 99, 107, 97 S.Ct. 980, 985 (1977) held that the Administrative Procedure Act does not afford an implied grant of subject matter jurisdiction permitting federal judicial review of agency action. The only jurisdictional statute alleged by G-Lam is Title 28, United States Code, Section 1346(a)(2) which as shown in Point I does not give the District Court jurisdiction over C.S.A. in this matter.

Thus G-Lam in its cross-claims has never pled nor has it moved to amend its cross-claims to include a claim under the Administrative Procedure Act, and even if it had, the Administrative Procedure Act does not give the District Court jurisdiction over this case.

POINT III

THIS CASE WAS PROPERLY REMANDED TO STATE COURT AFTER THE DISMISSAL OF THE FEDERAL DEFENDANT.

This case was removed from Supreme Court of the State of New York for Essex County to District Court by the federal defendant, C.S.A., pursuant to Title 28, United States Code, Section 1441(a) and 1442(a)(1). (Appendix pp. 9a-13a). Once the claim against C.S.A. is dismissed there is no basis for removal and the District Court quite correctly remanded the case to State Court pursuant to Title 28, United States Code, Section 1447(c).

The remand was proper, for absent the presence of the federal agency as a defendant, there is no statutory authority for removal. G-Lam in its Brief does not cite any authority for removal without C.S.A. as a party to the action.

The cases cited by G-Lam such as *Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207 (1970) and *Gem Corrugated Box Corp. v. National Kraft Container Corp.*, 427 F.2d 499 (2nd Cir., 1970), have no application to the case at bar. They only stand

for the proposition that a District Court can exercise jurisdiction over a pendent claim even after the federal claim is abandoned before trial. Thus in the cited cases the District Court at one time had jurisdiction over the case while in the present case the District Court never had jurisdiction, for it lacked subject matter jurisdiction over C.S.A.

Likewise, G-Lam's discussion of cases decided under Title 28, United States Code, Section 1441(c) just are not relevant to the case at bar. This case was not removed under this section, and there is no independent claim which would give the District Court jurisdiction.

G-Lam further admits that it and Latona are of the same citizenship and that they are diverse, although it tries to minimize the differences between them (Appellant's Brief, p. 23). Nevertheless, Latona is certainly not just a name party, and thus there is not complete diversity on both sides of the litigation. Absent complete diversity, there is no federal jurisdiction based on diversity. *Salem Trust Co. v. Manufacturers Finance Company*, 264 U.S. 182, 190, 44 S.Ct. 266, 267 (1924); *Rader v. Manufacturers Casualty Insurance Co.*, 242 F.2d 419, 427 (2nd Cir., 1957).

Thus since there is no basis for removal, absent C.S.A. as a party, the District Court was correct in remanding this case pursuant to Title 28, United States Code, Section 1447(c) as a non-discretionary act or for the reasons it would remand if it had discretion (Appendix p. 91a).

CONCLUSION

For all the foregoing reasons, the Order of the United States District Court for the Northern District of New York, dated September 7, 1977, granting summary judgment for the U.S. Community Services Administration and dismissing the cross-claims of G-Lam against it and then remanding the case to State Court, should be in all respects affirmed.

Respectfully submitted,

PAUL V. FRENCH
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